



March 6, 2001

Ms. Kristi LaRoe
Assistant District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

OR2001-0870

Dear Ms. LaRoe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144760.

The Tarrant County District Attorney (the "D.A.") received a request for the personnel file of a named employee. You have submitted for our review the information responsive to the request. You claim that the requested information, or portions thereof, is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.130 of the Government Code. The requestor has also submitted comments to this office. *See* Gov't Code § 552.304. We have considered the exceptions you claim, the submitted comments, and we have reviewed the submitted information.

Section 552.103 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The D.A. has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the information is requested, and (2) the information at issue is related to that litigation. Gov't Code § 552.103(c); *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The D.A. must meet both prongs of this test for information to be excepted under 552.103(a).

You contend that litigation was reasonably anticipated at the time the D.A. received the request. To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).

You base your contention that litigation is reasonably anticipated on two factors: comments and accusations made by the requestor which you perceive as threatening suit, and the fact that a complaint from the requestor alleging criminal conduct was presented to a grand jury on December 20, 2000. We note that this presentation to the grand jury occurred after the D.A. received the present request and thus is not germane to the question of whether litigation was reasonably anticipated on the date the information was requested. See Gov't Code § 552.103(c). As to the requestor's comments and accusations, assuming for the sake

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

of argument that these amount to a threat of litigation, we have no indication that objective steps towards filing suit occurred as of the date the D.A. received the present request. We conclude the D.A. has not met the first prong of the above-stated test. Accordingly, none of the information is excepted from disclosure by section 552.103 of the Government Code.

Section 552.117 may be applicable to portions of the submitted information. *See* Gov't Code § 552.117. Section 552.117(1) excepts from disclosure the home address and telephone number, social security number, and family member information of the employee, provided he requested under section 552.024, prior to the D.A.'s receipt of the present request, that this information be kept confidential. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We have marked the information at issue. If the employee made a timely section 552.024 election for the information we have marked, the D.A. must redact this information prior to releasing the submitted documents. The D.A. may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the marked Texas driver's license numbers in the submitted documents under section 552.130.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You state that "portions" of the file "clearly fall under the protection of section 552.101." Other than social security number and driver's license number information, you specify no other information which, you assert, is protected by section 552.101. As noted above, the individual's driver's license number must be withheld under section 552.130. In the event the individual's social security number is not protected by section 552.117, this information may be subject to withholding under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records

that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the D.A. pursuant to any provision of law, enacted on or after October 1, 1990. We have marked the information at issue. We find no other information in the file that is protected by section 552.101.

In summary, you must withhold the driver's license numbers pursuant to section 552.130. If the employee made a timely confidentiality election under section 552.024 for the categories of information we have marked that are subject to section 552.117, you must also redact this information. Otherwise, this information is not protected by section 552.117. In that event, the marked social security number information may be subject to withholding under section 552.101, as provided above. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

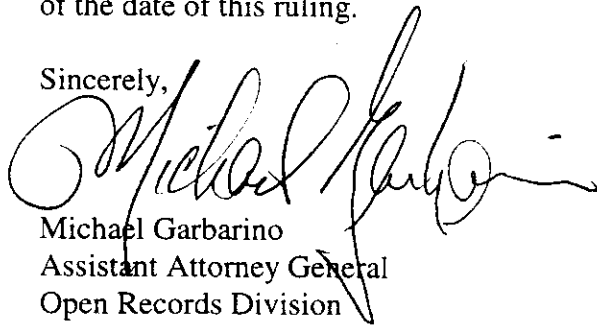
that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", is written over the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 144760

Encl. Submitted documents

cc: Mr. Randall D. Kelton
P.O. Box 1
Boyd, Texas 76023
(w/o enclosures)